No. 12,069

IN THE

United States Court of Appeals

For the Ninth Circuit

F. K. DENT,
Appellant,

vs.

ALASKA PLACER COMPANY,
Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

F. K. Dent, owner of placer mining locations held for a great many years, embracing, in part, the bed of the Nuikluk River, a navigable stream situate in the Second Judicial Division, Territory of Alaska, is seeking to eject defendant therefrom and recover damages. The defendant, since the passage of the Act of Congress of August 8, 1947, Public No. 383, 40th Congress (48 U.S.C. 381), has mined and extracted gold from the bed of said stream within the end lines of plaintiff's claims, and intends to continue so to do, without asserting any claim to possession. Plaintiff sought in this proceeding an injunction *pendente lite*. The denial of the application for the injunction *pendente lite* is the basis of this appeal.

(Note): Appellant was plaintiff below; appellee defendant. All emphasis in this brief is ours.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska is a Court of general jurisdiction (Sec. 1091, C.L.A. '33, 1949 Code Sec. 53-1-1) in Civil, Criminal, equity and admiralty causes. The Circuit Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the interlocutory orders of the District ourt of Alaska. (28 U.S.C. 225, 227.)

STATEMENT OF ISSUE.

The issue raised by this appeal is one of law, rather than fact, and involves the application of the Act of Congress of August 8, 1947. If this Act grants to plaintiff the temporary possession of the bed of the Nuikluk River by virtue of his mining locations then the injunction *pendente lite* should have been granted. Defendant contends, and the lower Court in its decision found (Tr. 56-65) that this Act of Congress did not grant such rights to plaintiff. The act of August 8, 1947, is as follows:

> "To amend section 26, title I, chapter I, of the Act entitled 'An Act making further provision for a civil government for Alaska, and for other purposes,' approved June 6, 1900 (31 Stat. 321), as amended by the Act of May 31, 1938 (52 Stat. 588).
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 26, title I, chapter 1, of the Act entitled 'An Act making further provision for a civil government for

Alaska, and for other purposes,' approved June 6, 1900 (31 Stat. 321), as amended by the Act of May 31, 1938 (52 Stat. 588), is further amended to read as follows:

" 'Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: Provided, That, *subject* ONLY to the laws enacted by Congress for the protection and preservation of the *navigable waters* of the United States, and to the laws for the *protection of fisheries,* and SUBJECT ALSO to such general rules and regulations as the Secretary of the Interior may prescribe for the *preservation of order* and the prevention of *injury to the fisheries,* all land below the line of ordinary high tide on tidal waters and all land below the line of ordinary high-water mark on non-tidal water navigable in fact, within the jurisdiction of the United States, *shall be subject to exploration and mining for gold and other* precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, *under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession* thereof for exploration and mining purposes until otherwise provided by law: Provided Further, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of the Interior authorizing any person or persons, corporation, or company to excavate or mine under any of said waters, and if such exclusive permit has been

granted it is hereby revoked and declared null and void. The rules and regulations prescribed by the Secretary of the Interior under this section shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumpings would actually obstruct navigation or impair the fisheries, and the reservation of a roadway sixty feet wide under the tenth section of the Act of May 14, 1898, entitled "An Act extending the homestead laws and providing for right-of-way for railroads in the District of Alaska, and for other purposes," shall not apply to mineral lands or town sites. No person shall acquire by virtue of this section any title to any land below the line of ordinary high tide or the line of ordinary high-water mark, as the case may be, of the waters described in this section. Any rights or privileges acquired hereunder with respect to mining operations in land title, to which is transferred to a future State upon its admission to the Union and which is situated within its boundaries, shall be terminable by such State, and the said mining operations shall be subject to the laws of such State.'

"Sec. 2. Nothing in this Act shall be deemed to affect or impair any valid claims, rights or privileges including possessory claims under the first proviso of section 8 of the Act of May 17, 1884 (23 Stat. 26), arising under any other provision of law.

"Approved August 8, 1947. (18)"

It has been the historical policy of the United States to reserve the shore lands and the beds of navi-

gable waters in Territories for the future state to be carved therefrom. This policy is, however, Congressional, and subject to change. (48 U.S.C. 411.)

The first relaxation of this policy came *after* the discovery, and mining, of valuable beach placer deposits at Nome. By the Act of Congress of June 6, 1900 (31 Stat. 329) the shore of the Bering Sea was open to *temporary possession* and mining under *miners' rules.*

Due to the pressure of mining interests near Juneau and near Cordova, where valuable beach deposits were known, Congress, by the Act of May 31, 1938 (52 Stat. 588) extended the same privilege of *possession* and mining, under *miners' rules,* to the rest of the tidal waters of the Territory of Alaska. (Both of these Acts, and the Act of August 8, 1947 are codified as 48 U.S.C. 381.)

At this point it is noted that in each act the area described

> "* * * shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, *under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration* and mining purposes until otherwise provided by law * * *"

In the Act of June 6, 1900 only the area between low and mean high tide was subject to rules of temporary

possession by miners, the shoal lands being left to control by the Secretary of War, subject to no exclusive permit being granted. When the Act was amended in 1938 to extend mining from the Bering Sea to all Alaska tidal lands the miners' rules governing temporary possession were extended to cover shoal lands, and the power of the Secretary of War relating to lands below high tide were transferred to the Secretary of Interior as applicable to preserving order and protecting commerce. In extending the effect of this Act to non-tidal waters in 1947 Congress added only appropriate protective measures to preserve fisheries.

STATEMENT OF FACTS.

The facts involved in this proceeding are largely non-controversial, and are sufficiently clear and uncontroverted in the record to form a firm factual foundation for the issuance of an injunction *pendente lite;* those important to a determination of this appeal are:

1. The mining claims of plaintiff involved in this proceeding were stakes by the predecessors of plaintiff in 1933, 1936 and 1938 (Tr. 9); and constituted relocations of valuable mineral deposits known and worked at since 1899. These claims all lie across the Nuikluk River, extending from its confluence with Melsing Creek downstream. (Complaint, Tr. 2-5.)

2. For several years prior to August of 1941, the principal stockholders of defendant, then doing business under the same name as a limited partnership, held leases on the upper claims involved in this action, as well as on a great block of ground immediately upstream from Melsing Creek; then commenced to mine the upper claim but were stopped by government in *U.S.A. v. Lucas, et al.* (Tr. 20-23.)

3. Upon the leases being abandoned the claims reverted to the owners, and were from divers owners and at divers times between 1942 and 1947 purchased by the plaintiff. (Tr. 38, 49 and 50.) Other claims lower downstream and not presently involved were staked by plaintiff during the same years.

4. That after purchasing said claims plaintiff held them adversely to all, except the United States, doing thereon the required annual labor or filing proper claim of exemption therefrom. (Tr. 58, and Complaint.)

5. That said mining claims were staked, marked out, located, held and locations thereof recorded in full and complete compliance with all the Federal and Territorial laws *relative* to initiating and protecting a placer mineral entry on the *public domain open to mineral* location.

6. On February 11, 1946 plaintiff secured a War Department permit to mine the bed of the

Nuikluk River within the end line of these claims. (Tr. 53.)

7. On August 8, 1947, Congress *opened* the beds of navigable streams of *temporary possession only* for the purpose of prospecting and mining under such reasonable rules and regulations as the miners in organized mining districts have heretofore made or may hereafter make * * * Plaintiff was then in possession of and thereafter remained in possession of the bed of said stream within the end lines of said claims, until,

8. Ousted by the defendant's entry thereon about September 15, 1947, with dredge; which ouster, and exhaustion of plaintiff's estate by extraction of minerals, defendant has since maintained.

9. On September 23, 1947, plaintiff notified defendant of the trespass (Tr. 52) and also of his pending application with the Department of Interior for a permit to mine. (Tr. 54.)

10. On October 21, 1947 defendant secured a permit to mine from the War Department. (Tr. 39.)

11. *On November 26, 1947* the Secretary of Interior issued regulations pursuant to the Act. (Tr. 37.)

12. The record does not disclose any claim by defendant to any right of temporary possession;

or that defendant has ever filed any notice of intent to mine as required by the regulations of the Secretary of Interior.

ARGUMENT.

The mining industry in Alaska is largely placer, and such deposits usually occur in the beds of existing streams. The early years of this Territory brought an avalanche of litigation, finally settling most questions of title to mineral lands.

With expansion of mining methods, and the raise in the price of gold, marginal deposits, often in rivers navigable in fact, became economic to mine. A good many of such properties were developed, held and mined under mineral locations. Such was the situation on the Nuikluk River when a local controversy opened into complaints to the departments of Interior and Justice, resulting in the injunction suit. (Tr. 20.) That proceeding, coupled with the decision of the Supreme Court in case of *U. S. v. Appalachian Power Company* (1940), 31 U.S. 377, threw many mining "titles" in Alaska into question. By "titles" I mean those possessory rights initiated by mineral locations as distinguished from patents. However, the "question" could only be raised by the United States, *not by adverse claimants,* and administratively the government took a paternal attitude toward mining. But the importance of this one instance can be seen in Senate Joint Memorial No. 7 of the Alaska Legisla-

ture in 1941 (Session Laws of Alaska, 1941, pp. 207, 208) set forth as Appendix I.

While there was sympathy for the claim owners on the Nuikluk River arising from their *mining having been enjoined,* it is readily apparent that the rest of the miners had good reason to fear that under the same rule the government might successfully contend the creek they were *on to be navigable,* and seek to recover from *all of the gold they had already extracted,* as well as enjoin further operations. As the United States Attorney that handled the injunction proceeding (Tr. 20) in 1941 I can attest the fact that this fear was not unfounded.

Consequently the mining industry, with the largest push from those operators mining in streams apt to be called navigable, petitioned Congress for relief from this fear in the form of rights to the temporary possession of and to mine non-tidal navigable waters. Congress granted that relief. Fear of interference by the United States was laid to rest. But, *claims were jumped;* and a new fear arose! What protection was afforded existing "claims to possession" under long standing mineral locations under the Act?

According to the lower Court in its opinion, if the stream be navigable:

a. No person, by virtue of an existing mineral location, has any possessory right to the bed of the stream, or the minerals therein.

b. The organization of districts by miners has been abolished by creation of statutory dis-

tricts, and miners no longer have authority to by rule regulate temporary possession of mineral deposits even under the Act; and

c. Anyone, by filing a notice of intent to mine, can now mine the bed of any navigable stream in Alaska, regardless of possession.

In simple language the Court's interpretation of the statute means than any person at any time can go onto any portion of the bed of any stream in Alaska, and, *contending the stream to be navigable,* start to mine! The only rule is that if there be a dredge on the stream, then, if the interloper mine by dredge, he must *start* 200 feet from the dredge! There is nothing to prevent me from extracting gold with a drag line from the bed of a stream 10 feet in front of a going dredge operation on ground often developed at a cost of hundreds of thousands of dollars, *contending the stream to be navibagle!*

The Act of August 8, 1947 specifies non-tidal waters "navigable in fact" as being open to mining. (Tr. 24.) A study of the interpretation and application of that phrase in recent cases will reveal the questionable nature of every mining title on a stream in an undeveloped area such as Alaska. The import of this decision on vested title is in that regard far reaching. Not only is every dredge present evidence of the navigability of the stream in which it operates, but the *bed* of any stream that may have been used by natives, trappers or prospectors, however meager the use, *may be classified as navigable in fact.* More sig-

nificant is the Congressional rule (Federal Power Act, as amended, 49 Stats. 838, 16 U.S.C. 796) defining "Navigable Waters" including shoals, falls, and rapids, where the *stream may be made navigable* by improvements, which rule was affirmed by the Supreme Court in *U. S. v. Appalachian Power Company* (Dec. 16, 1940.) (Supra.) Heretofore, the matter was of no immediate consequence for only the United States could raise the question of navigability, and the only likely result would be the cessation of mining. Now, however, the beds of all streams *that may be proved navigable in a proceeding between citizens* are open to claims of right. Every miner in Alaska who has proven his mining claims, and is mining, or expecting to mine, can look forward to an interloper sitting in the bed of his stream, contending it to be navigable.

It is felt that Congress knew of this and intended that the Act of August 8, 1948 confirm and settle titles, rather than disrupt them. Just as they opened the beach at Nome on June 6, 1900 with knowledge of mining by custom, and the beach of all Alaska on May 31, 1938 with knowledge of mining by custom, under claims (*Thompson v. Pelton,* 4 Alaska 510; *Revenue Mining Company v. Balderson,* 2 Alaska 363) with no intent to disturb titles, so much Congress have likewise intended the effect of the Act of August 8, 1947.

In discussing the Act of August 8, 1947, we take the position that the expression "* * * governing the temporary possession thereof * * *" means the "tem-

porary *exclusive* possession." If it were otherwise the right of temporary possession would be meaningless.

In our opinion the temporary right to the exclusive possession of the bed of the Nuikluk River within the end lines of the mining locations of plaintiff can be factually founded on two interpretations of the Act of August 8, 1947:

First. Congress intended to grant the right to mine to all persons presently in possession under *any existing* reasonable rules governing temporary possession of mineral deposits; and

Second. Congress intended the right of temporary possession of the beds of navigable streams to be treated separately from general mining laws, and governed solely by local miners' rules.

FIRST. CONGRESS INTENDED TO GRANT THE RIGHT TO MINE TO ALL PERSONS PRESENTLY IN POSSESSION UNDER ANY EXISTING REASONABLE RULES GOVERNING TEMPORARY POSSESSION OF MINERAL DEPOSITS.

It must be recognized that the mining laws, local and Federal, have been and are largely used to initiate and maintain temporary possessory rights. Vast areas are "staked, prospected, and dropped" only to have the process repeated as the price of gold or mining methods bring profitable mining thereof closer. Nearly all the small operators, and a number of the larger operators actually develop and mine to exhaustion their claims without proceeding to patent. As a prac-

tical matter, undoubtedly well known to Congress, the laws relating to mineral locations are laws largely governing the "temporary possession" of mineral deposits. The general mining laws of the United States (30 U.S.C. 28, et seq.) have been extended to Alaska. In them is left to the States, Territories, and "miners of each miner's district" the right to adopt rules

> "* * * governing the location, manner of recording, amount of work necessary *to hold possession of a mining claim* * * *" (30 U.S.C. 28).

Also 30 U.S.C. 22 provides:

> "Except as otherwise provided all valuable mineral deposits *in lands belonging to the United States,* both surveyed and unsurveyed, are hereby declared to be *free and open to exploration* and purchase, and the lands in which they are found *to occupation* and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, *and according to local customs or rules of miners in the several mining districts* * * *"

"local custom" and "rules of miners" have been largely superseded by legislation in the several states as well as the Territory of Alaska. This thought is expressed by Lindley in his Volume 1 on Mines (3rd Ed.) at page 117:

> "In Alaska, which until the passage of the Act of August 24, 1912, had no legislative branch of government, one would naturally expect to find elaborate and comprehensive codes supplementing

> Federal legislation. Such was the case in the earliest days of mining activity in that region, but these local codes have, as we understand the situation, gradually fallen in disuse, and in many localities where they once flourished they are practically ignored."

Congress in 1900 knew that "rules by miners" under the general mining laws were in use in Alaska, and that the beach at Nome was being mined; and confirmed those acts "under miners' rules heretofore made." No legislature was created for Alaska until 1912. Congress reviews all laws of Alaska, and has therefore actual knowledge of the Territorial mining laws. (Organic Act, Sec. 20, 37 Stat. 512.) In 1938 and again in 1947 in re-enacting and extending 48 U.S.C. 381 Congress knew that legislative acts had totally superseded miners' rules, and was aware of the legislation. Also in 1947 Congress was aware of three other factors:

A. That *prior* to 1938 it was the custom to "claim" possession for mining purposes on tide lands in the same manner as uplands.

B. That the use of the language "miners' rules" in the 1938 act had not raised any litigation concerning its meaning; and

C. That mining "claims" under "existing laws governing mineral locations" had been held for many years on the Nuikluk and other streams in Alaska. (L. of Alaska, 1941, p. 207 and Appendix I.)

All of which lead to the inescapable conclusion that Congress re-used the words "rules and regulations miners * * * may have heretofore made * * *" as *conservative mining nomenclature* of Federal Acts that had served and would serve the purpose of protecting *claims to rights initiated prior to the act under local rules, custom and/or legislation.* It is only consistent to read the statute in the plain light of known practices it was the design of the statute to condone; and to construe that language to include *custom and legislative acts* heretofore existing.

This position is borne out by the Congressional proceedings relating to enactment of the Act.

This Act, exclusive of Section 2, was passed by the House on June 2, 1947 (Congressional Record, House, P. 6334), as H.R. 174. With the bill was Report No. 309, 80th Congress, by Mr. Welch of the Committee on Public Lands. In explanation of the bill Mr. Welch had this to say:

> "The purpose of this bill is to make possible exploration for and mining of gold and other precious metals in the beds of navigable streams in Alaska. Such exploration and mining are not permissible under existing law.
>
> "A recent Supreme Court decision in the case of the United States v. the Appalachian Power Company (85 Law. Ed., p. 243) (311 U.S. 376), held in effect that any stream is navigable which can be made so. Prior to this decision placer mining was carried on in the beds of streams which are not, in fact, navigable except during high water periods in the spring.

"This bill would remedy the existing situation by extending the right to mine that now exists in bays, shores, and inlets, to navigable streams, subject to the jurisdiction of the War Department for the protection of navigation and the jurisdiction of the Interior Department for the protection of fisheries. Contained in this bill are safeguards aiding the Fish and Wildlife Service of the Interior Department to keep a constant check upon mining to make certain that the fish are not endangered."

The report sets out a letter from the Secretary of the Interior. The Secretary concerned himself only with the protection of navigation, and fisheries, excepting for the following statement:

"Finally, the bill would continue in effect a confusing and meaningless distinction in the text of the existing law between mining operations carried on in the area between low and high tide and those carried on in the area below low tide, and would seemingly extend this distinction without a difference to the non-tidal navigable waters which it would open to mining operations. A rearrangement of the provisions of the bill that would give them uniform application in form, as well as in substance, to all types of navigable waters would be of material assistance in their administration."

In passing the Act the entire House discussion is as follows:

The Speaker. Is there objection to the present consideration of the bill?

Mr. Cole of New York. Mr. Speaker, reserving the right to object, I woud like to ask some questions of the Delegate from Alaska. Under existing law, it is illegal for the exploration of gold in navigable waters of the American Territories. This bill makes possible the exploration of gold mining in the rivers of Alaska. Heretofore it has been the policy of the Government to reserve the mineral rights of the Territories for the benefit of that Territory, if and when it should become a State. This bill reserves the right to the Territory of Alaska, if and when it becomes a State, to cancel the authority granted under this bill. I should like to inquire of the Delegate if the present government of the Territory of Alaska has expressed its attitude concerning the bill.

Mr. Bartlett. Mr. Speaker, in reply to the gentleman from New York (Mr. Cole) I should like to say that the fifteenth session of the Territorial legislature in 1941 adopted a memorial addressed to the Congress asking that legislation be passed with respect to specific situations regarding the Nuikluk River on the Seward Peninsula. Since then it has seemed advisable to extend the authority of the bill because I am informed that a decision of the Supreme Court was to the effect that any stream susceptible of being improved to the point of navigation could be deemed to be navigable. If that were literally construed in Alaska substantially all the gold-mining industry would have to suspend. It is our second largest industry.

Mr. Bartlett continued:

I should like to say further that the authority of the War Department under the present law and regulations is not diminished by reason of any provision of this bill.

I refrained from introducing it for considerable time so that I might be satisfied that adequate provision should be made for the protection of the salmon running in this river and other rivers that might be protected. I now believe the language of the bill will accomplish that purpose and that mining can be carried on and the fish will not be endangered. The Secretary of the Interior has adequate authority, though the Fish and Wildlife Service, to compel the suspension of mining operations if the fish runs are interefered with.

Mr. Cole of New York. The gentleman has not yet answered the question which I have raised. The gentleman pointed out that the Territorial legislature in 1941 did memorialize Congress to make mining possible as to a particular stream. That is quite a different proposition from the one we have before us today which grants blanket authority for mining operations in all streams. I think it is very important that the Congress have some official expression from the Territorial government that that government favors this bill, because it is conceivable that even though the Territory, once it becomes a State, may have the right to cancel the privileges conferred by this bill, when that right is exercised by the State, a sizable claim for money damages might be due from the State to an individual. So I suggest that if the gentleman has not had official word from the Territorial government as to this bill that we

here in Congress should have that word before the bill is passed.

Mr. Bartlett. I should like to say to the gentleman from New York that the Territorial legislature will not be in session again for two years. If there were literal construction of the Supreme Court decision it might have the effect of suspending practically all gold-mining operations in the Territory at this time, which, of course, would be a calamity.

Mr. Cole of New York. Of course, it is not my desire to delay the passage of the bill. I wonder if the gentleman cannot, on his own authority, as Delegate and representative of the Territory of Alaska, assure the Congress that his constituency favors this bill.

Mr. Bartlett. I should say that the Territorial government would absolutely favor this bill so long as adequate provisions are made to protect any fish which might be in any of those streams. Those provisions are contained in the bill. I have no doubt if the legislature were in session tomorrow it would approve this bill.

Mr. Cole of New York. Mr. Speaker, I withdraw my reservation of objection.

The Senate Report on this bill (Mr. Dworshak, Public Lands, Calendar No. 265, Report No. 258, 80th Congress) contains the identical language of the House Report (above); and again contained a primary interest in the protection of fisheries and navigation.

The Senate passed this bill, with an amendment, on July 24, 1947 (Congressional Record—Senate, P. 10002) the proceedings relating thereto being:

The bill (H.R. 174) to amend section 26, title I, chapter I, of the act entitled "An act making further provision for a civil government for Alaska," and for other purposes, was announced as next in order.

Mr. O'Mahoney. Mr. President, this is the measure which I thought was under consideration when I sent an amendment to the desk a few moments ago.*

The President pro tempore. Is there any objection to the consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. Knowland. Mr. President, I take it from the remarks which have been made that this bill relates only to Alaska?

Mr. O'Mahoney. That is correct.

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*The Senator referred to the following proceedings relating to the previous bill (P. 10001):

Mr. Butler. The bill does not affect at all the question of title to tidelands or submerged lands.

Mr. Johnson of Colorado. It affects them in no possible way in any State?

Mr. Butler. That is correct. That is stated in the report accompanying the bill.

Mr. O'Mahoney. Mr. President, I rather think there is some error in that statement. After this bill passed the House there was a decision of the Supreme Court which changed the considerations involved in this bill. I have consulted the Senator from Idaho (Mr. Dworshak) and the Delegate from Alaska (Mr. Bartlett); and, at the request of the Department of the Interior, I offer the amendment which I send to the desk and ask to have stated.

Mr. Butler. Mr. President, may I inquire if the Senator is referring to order No. 265, House bill 174?

Mr. O'Mahoney. Yes.

Mr. Butler. The Senate is considering order No. 162, Senate bill 1081.

Mr. O'Mahoney. I am sorry. I was told that order No. 265, House bill 174, was being considered, I withdraw the amendment.

Mr. Knowland. It has no effect in any State now existing?

Mr. O'Mahoney. It has no effect on any State. I now offer the amendment which inadvertently I suggested in connection with the previous bill.

The President pro tempore. The amendment offered by the Senator from Wyoming will be stated.

The Chief Clerk. At the appropriate place in the bill it is proposed to insert the following:

> Any rights or privileges acquired hereunder with respect to mining operations in land, title to which is transferred to a future State upon its admission to the Union and which is situated within its boundaries, shall be terminable by said State, and the said mining operations shall be subject to the laws of such State.
>
> Sec. 2. Nothing in this act shall be deemed to affect or to impair any valid claims, rights, or privileges, including possessory claims, under the first proviso of section 8 of the Act of May 17, 1884 (23 Stat. 26) arising under any other provision of law.

The President pro tempore. The question is on agreeing to the amendment offered by the Senator from Wyoming.

The amendment was agreed to.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time and passed.

The amended bill was passed by the House without objection, or comment, on July 25, 1947. (Congressional, House, P. 20388.)

The case referred to by Senator O'Mahoney could only be the case of *U. S. v. California,* 332 U.S. 19.

It is therefore concluded that Congress did not intend to upset practices in effect, and intended to confirm existing claims. The existing claims of plaintiff (and others) were based on the statutes, as distinguished from miners' rules, and the record reveals that the method and manner of staking and holding the mineral locations by plaintiff and his predecessors is not questioned.

SECOND. CONGRESS INTENDED THE RIGHT OF TEMPORARY POSSESSION OF THE BEDS OF NAVIGABLE STREAMS TO BE TREATED SEPARATELY FROM GENERAL MINING LAWS, AND GOVERNED SOLELY BY MINERS' RULES.

This proposition is equally as sound as that stated in the foregoing portion of this brief. Congress in passing the Act of June 6, 1900 (48 U.S.C. 381 in original form) extended the mining laws of the United States to Alaska. This included 30 U.S.C. 28 vesting regulatory powers in miners. To have continued on in that act vesting rule powers in "miners in organized mining districts" to govern temporary possession rights on tidal lands is inconsistent with treating possessory rights in such lands in the same class as other placers, and is consistent with vesting solely in such miners regulatory powers over temporary possessory rights on tidal lands.

To have repeated this identical vesting of power in miners in organized districts in the 1938 Act, covering tidal *and shoal lands* of all of Alaska, *in the face*

of adequate covering by statutes of possessory rules to upland deposits, would indicate a clear revesting of such sole authority in local miners. The identical language is found again in the 1947 Act.

In so doing Congress was recognizing that such "temporary possessions" were not subject to general grant under the general mining laws, or are proper Territorial legislative subjects, but had been the subject of purely local rule and custom; *and should remain so,* with specific affirmation of all *such rules heretofore made.*

The lower Court seemed to feel that miners in organized mining districts no longer have rule making power. (Tr. 60-61.) With this we cannot agree. The general mining laws use the phrase "the miners of each mining district * * *"; and those applicable specifically to Alaska (48 U.S.C. 381, and 383) use the phrase "* * * miners in organized mining districts * * *" We can see no real difference, for there can hardly be a "district" without some organization, however loose.

48 U.S.C. 383 grants miners in *organized districts* certain additional powers, *and* the right to name a recorder if the district is not within one designated by the Court. And, with the repeated statement in reenacting 48 U.S.C. 381 it can hardly be said that miners have no rule making power. *Betsch v. Umphrey* (9th Cir. 1921), 270 Fed. 45.

Largely the "rules and regulations" of miners are not the written result of parliamentary meetings since

in great measure the statutory regulations are adequate, but consist in custom and usage. Such "custom" is evidenced by expression of the Court in the following cases:

Peca v. Huddleston, 5 Alaska, 241;

McFarland v. Alaska Preseverance Mining Co., 3 Alaska 308, 311, 331, 336;

Alaska Gold Recovery v. Northern Mine and Trading Company, 7 Alaska, 386, 391, 395.

See also:

Atchison v. Peterson, 87 U.S. 507, 510, 512.

The record in this case contains ample evidence of the "custom" as it related to the Nuikluk River, it being clear that local miners appropriated the bed thereof, and held it, in the same manner and according to the same rules of law as relate to mineral locations generally. (*Session Laws of Alaska,* 1941, p. 207: Appendix I.) This is true throughout Alaska. Such common custom does not need the expression of a "miners' meeting".

However, the record reveals that a miner's meeting was called. (Tr. 44-46, 54-55.) Also, that the defendant had notice and was present. The defendant (Tr. 55) and the lower Court (Tr. 60-61) attempts to belittle the meeting. It is true the meeting was of the old Council Recording Precinct miners, not the present Cape Nome Precinct. The Cape Nome Precinct has throughout late years, absorbed and consolidated a great many old recording precincts, no longer needed as separate districts, to facilitate ad-

ministration resulting in a present large area unrelated to local mining problems. This problem is local; it was dealt with by miners concerned with or affected by the problem on the Nuikluk and Solomon Rivers. It is to be noted that neither defendant nor the lower Court claimed that the meeting was not properly organized or that those in attendance did not *constitute all the actual miners in the area of the Nuikluk River* affected by the problem of claims on navigable streams. Nor do either the defendant or the lower Court take issue with the regulations adopted as being unreasonable or contrary to the laws of the United States. The rules adopted did nothing more than accord recognition to long existing custom. The rules adopted were:

> Rule 1. Owner, or owners, of valid placer locations embracing within its boundaries any portion of the bed of a navigable stream shall have the exclusive right to prospect and mine said portion of the bed of a navigable stream so long as such valid mining locations are maintained in effect under the laws of the United States, or the Territory of Alaska.
>
> Rule 2. The owner, or owners, of valid placer mining locations abutting ordinary high water on the banks of navigable rivers shall have the exclusive right to prospect and mine the beds of navigable streams abutting such placer mining locations from mean high water to the center or thread of the stream at summer low water so long as such mining locations remain in effect under the laws of the United States, or the Territory of Alaska.

> Rule 3. The rights of exclusive possession for the purpose of prospecting and mining in these rules and regulations provided are for the temporary use of the beds of navigable streams, shall not confer any property right, and apply with equal force and effect to all valid mining locations heretofore made, and all those hereafter made. The application of these rules is by this meeting limited to the Nuikluk River in the District of the Seward Peninsula.

It is to be noted that there were *no negative votes in the rules* (Tr. 46) even by Mr. Loman and his two crewmen.

These rules adequately establish the legal right of the plaintiff to the lands withheld by the defendant.

In denying the temporary restraining order the lower Court said:

> A reading of the Act will disclose that it was the intent of Congress to provide *no exclusive right to the lands under navigable waters.* The conditions under which mining for gold or other precious metals may be taken apply to all citizens and those who have legally declared their intention to become such, subject, however, to the laws enacted by Congress for the protection and preservation of navigable waters, the fisheries, and under rules and regulations of order and the prevention of injuries to the fisheries.

This view of the Act is plainly error, for Congress specified rights of temporary possession could be acquired.

Stress is laid by defendant and the lower Court on the fact that prior to August 8, 1947, plaintiff's claims carried no right to mine the bed of the stream; and that plaintiff was barred by the judgment in the *Lucas* case. (Tr. 20-22.) They overlook the "injunction" in that case:

> "It Is Hereby Ordered, Adjudged and Decreed that the defendants Alaska Placers Company, a limited partnership, Joseph E. Lucas and (15) Eugene V. Lucas, and their servants and agents, be and they are hereby *barred from mining or removing in any manner, gold, precious minerals or things of value from the bed of the Nuikluk River* below the line of ordinary high water from a point on the Nuikluk River fifteen hundred (1500) feet upstream from its confluence with Melsing Creek downstream to its confluence with the Fish River, which flows into Golofnin Bay off Norton Sound, Territory of Alaska, *until such time as legal authority so to do is secured by said defendants from the sovereign owner of said herein described real property.*

The Court did not annul the claims, or declare them void; and in fact looked prospectively to an act such as that of August 8, 1947, or legislation by a future state carved from the Territory. Plaintiff in purchasing the claims come under the *bar* of that case; *but only until "* * * legal authority* (to mine) *is secured from the sovereign owner * * *"*

The lower Court seems to find some point in stating (Tr. 64):

> "* * * he has failed to show, either in his pleading or affidavits that he has complied with the rules and regulations of the Secretary of Interior * * *"

but what it is I cannot understand. The rules of the Secretary require notice of "intention to mine or dredge"; but an intent to mine, or mining, is not a part of an ejectment proceeding. Such a notice cannot initiate any right of possession. Its sole object is to advise the Secretary so that he may see to it that fisheries are not thereby adversely affected. This is recognized by the defendants for they do not claim any possessory right, or even that they filed such a notice.

The lower Court felt impelled to point out that we must succeed on the strength of our own title, not the weakness of that of defendant. This probably arose through a misconception of our interest in stressing the total lack of claim to possessory right by defendant. We laid that stress as a firm *factual* basis for injunctive relief. This is no case of conflicting claims to title wherein the Court in the exercise of sound discretion might deny injunctive relief *pendente lite;* but is a case where *if any right of possession exists* it is in the plaintiff. If the law supports plaintiff's right injunctive relief must be granted. *Wasky v. McNaught* (9th Cir. 1909), 163 Fed. 929.

CONCLUSION.

The plaintiff by virtue of his mineral locations established and held under the laws of the Territory relating to mineral locations, has the right of possession under custom and miners' rules, to the bed of the Nuikluk River within the end lines of the claims; and the mining thereof *pendente lite* by defendant should be enjoined.

Dated, Fairbanks, Alaska,
March 25, 1949.

Respectfully submitted,
COLLINS & CLASBY,
CHARLES J. CLASBY,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Senate Joint Memorial No. 7

To the Congress of the United States and to the Honorable Anthony J. Dimond, Delegate to Congress for the Territory of Alaska:

Your Memorialist, the Legislature of the Territory of Alaska, in Fifteenth Regular Session assembled, respectfully submits that:

Whereas, the Niukluk River is a tributary of Fish River on Seward Peninsula in the Second Division of the Territory of Alaska and is North of 64° Latitude and consequently frozen during the greater part of every year; that during the lesser period of the year when it is open and running the ordinary state is for the water to be low with numerous bars and shoals; that freight is transported up the river to the community of Council which is situated on the banks of the Niukluk River about 12 miles above its point of confluence with Fish River; that for such transportation flat power scows tare used, but traffic is possible only at certain stages of the water, and auxiliary horse or tractor power on shore is required to cross bars and shoals; and,

Whereas, the bed of the Niukluk River, its benches, the beds of its tributaries and their benches, are in a highly mineralized zone, and have been the scene of mining operations since the early days of gold discoveries on Seward Peninsula. From the beds and benches of Ophir Creek, a tributary of Niukluk River,

several miles above Council, Alaska, some of the most phenomenal gold recoveries in Alaska's history were made; and,

WHEREAS, from the time of the first discoveries of gold in the vicinity of Council, Alaska, prospectors and miners have located and held by mineral location much of the area of the bed and benches of the Niukluk River and its tributaries, and mined many portions in the firm belief that the locations were proper, and the mining, extraction and disposition of gold therefrom legal and proper; and,

WHEREAS, in 1940 the United States Government by and through the office of the United States Attorney at Nome, Alaska, instituted an action in the District Court at Nome to restrain and prohibit any further mining and extraction of gold from the bed of the Niukluk River, from its confluence with Fish River, to a point about 12 miles upstream, that is, as far as Council, Alaska. Such action is based on the contention that this 12 mile portion of the Niukluk River is a navigable stream and is consequently not open for mineral location nor subject to mining or the extraction of gold therefrom. That as a result of the commencement of such action, or anticipating its commencement, owners and lessees of some mineral claims embracing part of the area concerned, have been required as a reasonable business practice to alter their plans for mining; other owners have had their claims mined by third parties ignoring locations; other owners have had options and agreements abandoned because of the uncertainty created, and other

litigation has been instituted in the District Court at Nome between claim owners and those ignoring their rights; and

WHEREAS, any curtailment of mining or avoidable interference with it in the vicinity of Council is to the immediate detriment of the residents of that section and of the Territory of Alaska. The single industry of the Council area is gold mining, and the residents and inhabitants are dependant upon it. The river area concerned has been under mineral location for more than 30 years, mining done thereon, and locators have expended large amounts of money and much labor in the doing and performing of annual assessment work. That no action was taken by the Government until 1940 to indicate that the rights of locators were non-existent, and their expenditures and labors futile. The shallowness of the ordinary water of the Niukluk River, the numerous sand bars, and the frozen condition of the river during the greater part of each calendar year makes it doubtful that the portion of the stream concerned is navigable in the sense intended by law.

NOW, THEREFORE, your Memorialist, the Legislature of the Territory of Alaska, respectfully urges that appropriate legislation be introduced and enacted by the Congress of the United States whereby the Nuikluk River would be declared a non-navigable stream.

AND YOUR MEMORIALIST WILL EVER PRAY.

Passed by the Senate, March 6, 1941.

Passed by the House, March 14, 1941.